

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

NANCY DREW SUDERS :
v. : CASE NO.
PENNSYLVANIA STATE POLICE : 1:00-CV-1655
:

TRANSCRIPT OF PROCEEDINGS
PRETRIAL CONFERENCE

BEFORE: HON. SYLVIA H. RAMBO

DATE : February 18, 2005
9:00 a.m.

PLACE : Judicial Conference Room, 8th Floor
Federal Building
Harrisburg, Pennsylvania

BY : Wendy C. Yinger, RPR
U.S. Official Court Reporter

APPEARANCES:

DONALD BAILEY, ESQUIRE
SAMUEL C. STRETTON, ESQUIRE
SHERI COOVER, ESQUIRE
For the Plaintiff

SARAH C. YERGER, ESQUIRE
HOWARD HOPKIRK, ESQUIRE
For the Defendant

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1 THE COURT: Ms. Yerger, who is your
2 associate?

3 MS. YERGER: Howard Hopkirk.

4 THE COURT: Hopkirk, H-o-p-k-i-r-k?

5 MR. HOPKIRK: Yes, Your Honor.

6 MR. BAILEY: Your Honor, this is Sheri
7 Coover.

8 THE COURT: I know Sheri. How are you, Mr.
9 Stretton?

10 MR. STRETTON: Good. Thank you, Your Honor.
11 I'm doing okay. I'm slowly getting over the flu.

12 THE COURT: Are you going to be able to try
13 this case?

14 MR. STRETTON: Oh, yes. I'm having my
15 operation next week for the hernia I got as a result,
16 but I'll be fit as a fiddle on March 15th.

17 THE COURT: Okay. Is it possible we could
18 start the afternoon of the 14th, just to pick the jury
19 and -- my concern is, as I understand it, you're going
20 to need a minimum of seven days to try this case.

21 MR. STRETTON: I doubt it, but I put the
22 outside limit. But, you know, I like to try a case
23 quick, so I bet that I'll be done in two days. That's
24 my hope.

25 THE COURT: My other concern is that, on the

1 16th, I have to be down at the Third Circuit, so I'll be
2 in Philadelphia. I can't avoid it. That's a Wednesday.

3 MR. STRETTON: I can start in the morning of
4 the 14th.

5 THE COURT: Let's do it on the afternoon.

6 MR. STRETTON: That would be at 1:00, Your
7 Honor?

8 THE COURT: 1:30. And we'll pick the jury.
9 Now before we get started on anything, I want to address
10 this Kroll report.

11 MR. BAILEY: Your Honor, if I may. There
12 are actually two issues there. I think there's an IG
13 report on which the Kroll report is based, and I
14 erroneously -- I believe when I had lodged and went over
15 the issue of the Kroll report with Mr. XXX knoll, which
16 was prior to the Supreme Court argument, the reference
17 technically in what was lodged on the motion was the IG
18 report. They're essentially the same thing.

19 One is derivative of the other. But the IG
20 report was an investigation done by the state
21 government, so it's actually -- what's at issue in that
22 subject matter is actually both of those.

23 THE COURT: Now, hold on a minute. There's
24 a reference in the status report that was filed back in
25 September, I believe September 28th, that refers to a

1 BPR report. Now what is that?

2 MR. BAILEY: Ma'am, that is an issue of
3 respectful disagreement. When the litigation began, we,
4 being Nancy and I, had heard rumors of a Bureau of
5 Professional Responsibility investigation into the
6 complaints that Nancy had been making to the governor's
7 office, to Senator Jubelirer, about alleged misconduct
8 by the Defendants.

9 Sarah, who can speak for herself here, of
10 course, told me that there was no BPR report, but then
11 she also said -- I persisted to ask questions about
12 this, and there's some reference to it, I think, in the
13 end of the Easton deposition, but she also said that,
14 even if there were, that it would not be made available
15 because it was attorney work product.

16 You know, we didn't know definitely whether
17 it was there or not, and I had simply felt that it was
18 covered by Rule 26 in any event. When this issue arose
19 at the -- when we did the LR 16.3, these documents
20 arose. We have not had an -- we haven't seen them
21 before. I'm going to be doing -- we did a motion in
22 limine on it, I think, that should be filed by now. And
23 that was one of the things that was, we thought, should
24 have been in and the reason I put it in the status
25 report, given information that had arisen after the case

1 went to the Supreme Court, including statements
2 police officers. And we got a couple affidavit
3 communicated those to -- we communicated those to Sarah,
4 and which Adrienne can attest to, but in any event, at
5 the LR 16.3, Sarah informed me that it's attorney work
6 product and we're not allowed to see it.

7 But it comes into the Court, of course, or
8 at least there's an attempt to bring it in, to use it
9 to, we think on largely irrelevant grounds, but
10 regardless, you know, attack Nancy. That's where that
11 is.

12 THE COURT: Well, let's get back to the
13 Kroll report, which was the subject of a motion in
14 limine. When did you ever receive the Kroll report?

15 MS. YERGER: I did not receive a copy of the
16 Kroll report until Mr. Bailey provided me a copy of the
17 Kroll report. I'm sorry. Mr. Bailey provided me a copy
18 of the Kroll report after the attorneys conference.

19 THE COURT: After?

20 MS. YERGER: After the attorneys conference.
21 I did receive an Inspector General report -- actually
22 the office did, via a filing with the -- that Mr. Bailey
23 made to the United States Supreme Court. However, the
24 Inspector General report is a completely and totally
25 different report than the Kroll report.

1 The Inspector General is an agency of the
2 Commonwealth, an independent agency of the Commonwealth.
3 The Kroll report is -- it's referred to as Kroll because
4 that's the name of the business or company, and that
5 report was an independent organization that was asked by
6 the governor to do a report about the Pennsylvania State
7 Police. So there are two separate documents. Although
8 I knew what -- I knew I had heard the word Kroll report,
9 I didn't have a copy of it and was certainly not made
10 aware of its relevance to this lawsuit or that it may be
11 used in the lawsuit.

12 MR. BAILEY: Your Honor, may I respond very
13 briefly? A Kroll report has been all over the news.
14 It's very difficult for me to believe, with all due
15 respect to Sarah, who I respect very much, that this
16 office, that their office or she was not aware of it.
17 That's not the issue, if I may, if I may.

18 THE COURT: Well, isn't the issue notice
19 that it was going to be used as an exhibit in trial, I
20 mean, not its existence, but that it was, in fact, going
21 to be an exhibit that you were going to use at trial?

22 MR. BAILEY: The -- in my view, it was
23 already part of the record. It had gone to the Supreme
24 Court. It had been lodged in the Supreme Court. The
25 issue is, there's a public document out there that has

1 to do with the -- you know, whether it's an exhibit or
2 not, to respond to you, whether it's an exhibit, in my
3 mind, the Kroll report and the IG report were the same
4 thing. What Kroll did -- and it's -- well, in a
5 nutshell, Judge, these issues -- this was an official
6 report done by an official agency of the government. I
7 don't see why we can't walk into any courtroom where
8 it's a cogent issue and introduce it and use it. My
9 understanding was, from your order, that we couldn't use
10 it.

11 THE COURT: Because it wasn't disclosed as
12 an exhibit pursuant to the rules.

13 MR. BAILEY: Judge, the -- okay. Then we
14 can't use it. I mean, you've ruled.

15 MR. STRETTON: Stop, stop.

16 MR. BAILEY: No, no. You've ruled --

17 MR. STRETTON: Your Honor --

18 MR. BAILEY: We won't use it.

19 MR. STRETTON: Is it possible we can use it
20 in rebuttal depending on what the Commonwealth presents
21 in their defense, even if we can't use it as part of our
22 case?

23 THE COURT: That report is rather extensive.
24 I mean, what are you going to use? Have you indicated
25 what portion of the report that you would expect to use?

1 MR. STRETTON: What I could do is this: I
2 could submit something later today, what I would intend
3 to use in rebuttal, depending on what the government
4 presents as part of their defense, and then you can make
5 your ruling on that. I wasn't involved in any of the
6 earlier portions of this, so I can't speak to the issues
7 of what was shown or not shown, but I thought, perhaps,
8 we could use some of it in rebuttal, depending on what
9 they use, even though we didn't apparently disclose it
10 on a timely basis, as indicated.

11 THE COURT: So it's clear, I'll let you do
12 that. That doesn't mean -- I'll let you notify her of
13 what you might possibly use.

14 MR. STRETTON: I'll do that this afternoon.

15 THE COURT: But that doesn't mean, when the
16 time comes, that I still may not have to make a ruling.

17 MR. STRETTON: That's clear.

18 MR. BAILEY: Your Honor, I can tell you what
19 we'll use, what's in there.

20 THE COURT: Well, let him furnish it in
21 writing with a copy to me.

22 MR. STRETTON: We'll do that this afternoon
23 before I leave Mr. Bailey's office.

24 THE COURT: And I'll wait until I hear a
25 response from you.

see q - Jones

1 decision is very quick to indicate that, for instance,
2 if a superior was involved in sexual harassment, that
3 doesn't meet the test. There has to have been some
4 official act on the part of that superior that was
5 involved in the constructive discharge. Read that very
6 carefully. So, I mean, they even set the example. They
7 use the example that, if a superior is involved in a
8 sexual harassment, that in itself does not make them --

9 MR. BAILEY: Your Honor, if I may?

10 THE COURT: Yes, sir.

11 MR. BAILEY: With all due respect, the issue
12 of an official act is a definition by the Court that, as
13 opposed to a constructive discharge, the official takes
14 some kind of action like, you're fired, you're
15 dismissed, etc. And what the Supreme Court, I believe,
16 was saying was that, if you come back and can show that
17 there was a constructive discharge, and that's the
18 equivalent of the official act.

19 Now Mr. Thomas, in his dissent, addresses
20 that very issue. Then the issue became -- and that's
21 what they respectfully disagree with you on, on the
22 issue of -- on the summary judgment which you granted.
23 Now, I believe that the second issue was whether or not,
24 and this is where Judge Fuentes respectfully disagreed
25 with you and was overturned, was the issue surrounding

1 MS. YERGER: And you'll understand that I'll
2 object for hearsay reasons?

3 THE COURT: I understand, I understand.

4 MR. BAILEY: If I may. What we had wanted
5 to do, we had subpoenaed Mr. Miller.

6 THE COURT: Oh, the commissioner?

7 MR. BAILEY: Yes, ma'am. And the IG report
8 specifically, directly addresses the issue of verbal
9 complaints made to the system and the noncompliance of
10 the Pennsylvania State Police regulation and practices
11 with in-place executive orders of the Pennsylvania State
12 Government that verbal complaints are to be followed up.
13 And that was the precise, exact basis upon which you
14 granted summary judgment on behalf of these Defendants,
15 who should have known at the time of what those
16 practices and conflicts were, where Nancy was found by
17 you to not be in compliance with -- with not making a
18 reasonable effort to comply and report the
19 discrimination. And you dismissed her out of summary
20 judgment. And I will pull those portions --

21 THE COURT: Let's get it straight right now.
22 The issues in this trial are, first of all, whether
23 there was a constructive discharge, whether or not any
24 superiors were involved in the harassment that was
25 alleged to have gone on. Now, the Supreme Court

1 the affirmative defense.

2 And the affirmative defense, that's where
3 this report comes in, and that's where we believe that
4 the jury should not be allowed to hear what, I think,
5 amounts to a fraudulent claim, that there was a policy
6 or practice in place that Nancy did not take advantage
7 of.

8 THE COURT: Here is the footnote which I
9 think is instructive. It's at footnote 4 of the
10 opinion. When an official act does not underlie the
11 constructive discharge, the Ellerth and Faragher
12 analysis, we here hold, calls for extension of the
13 affirmative defense to the employer.

14 MR. BAILEY: That's exactly what I just
15 said. The issue is connected to the availability of the
16 affirmative defense and --

17 THE COURT: But there has to be something
18 more than participation in the harassment. There has to
19 be an official act.

20 MR. BATLEY: All right, Judge. You know,
21 you're the judge, and we'll litigate it, of course, and
22 according to your instructions. I would just like to
23 bring to the Court's attention that the issue with the
24 IG's report goes to precisely that alleged affirmative
25 defense, the availability of the affirmative defense.

1 And judicial notice could and should be taken .
2 report and its finding that the -- and we will
3 the parts for opposing counsel and bring to your
4 attention, that the Pennsylvania State Police, that
5 their anti-discrimination policy was out of compliance
6 with state law, and it directly affected the facts
7 situation with Nancy Suders.

8 MS. YERGER: I respectfully, if I may, Your
9 Honor?

10 THE COURT: Yes.

11 MS. YERGER: The Inspector General report,
12 which is different than the Kroll report, and the Kroll
13 report are not public records. They do not fall within
14 the public records exceptions. They were independent
15 agencies; therefore, it's hearsay. He would have to
16 bring in every single person that prepared that report
17 to go over and all the people -- not the people that
18 prepared the report, but the people that made
19 allegations in the report in order to establish what
20 he's trying to establish. The report itself is not
21 enough because it's hearsay.

22 MR. BAILEY: Our position very simply is,
23 the state police should not be allowed to come in here,
24 present false information, and if they do, we will react
25 accordingly.

1 THE COURT: Let's go to the Plaintiff's
2 pretrial memo. I note the rather extensive
3 list. I assume you're just being cautious.
4

5 MR. BAILEY: Yes, ma'am.

6 MR. STRETTON: Your Honor, I started going
7 through with Mr. Bailey yesterday, and I'm willing to
8 spend some time today, and then I'm going to call Sarah
9 and give her who I really intend to call. But it won't
10 be every witness, I can guarantee you. There's a couple
11 key people. One question I had, maybe we can resolve
12 it. The original named Defendants, the individuals,
13 obviously they're not named Defendants now, but can you
14 have them available or should I do it the old fashioned
way, have subpoenas on them?

15 MS. YERGER: You need to subpoena them.

16 MR. STRETTON: I may need to get some
17 current addresss from you. I'm sorry to talk cross
18 purposes, Your Honor. But any of them who are still in
19 your employ, if you can make them available, that would
20 be great. If not, we should give subpoenas, I guess,
21 through your office then; right?

22 MS. YERGER: You don't have to personally
23 serve them, but you need to do it.

24 MR. STRETTON: Thanks very much.

25 THE COURT: Who's left in this case, by the

1 way?

2 MS. YERGER: Pennsylvania State Police is
3 the only Defendant.

4 THE COURT: PSP, okay.

5 MR. STRETTON: That's my understanding. We
6 would be calling all of those individuals, obviously.

7 THE COURT: Now I have allowed them to
8 produce an economic expert. You got the report?

9 MS. YERGER: I just got it this morning.

10 THE COURT: Are you going to be able to get
11 it to your expert in time?

12 MS. YERGER: (Witness nodded head
13 affirmatively.)

14 THE COURT: You have here six to seven days.
15 That's why I was concerned.

16 MR. STRETTON: When Mr. Bailey and I talked
17 about it, when he was doing the pretrial memorandum, I
18 didn't know enough about the case, so I said, let's list
19 it for approximately six or seven days, but you know my
20 practice is to try to move these cases much quicker, and
21 I'm hoping to be done the Plaintiff's case within two
22 days of selecting a jury. I think that would be a
23 realistic approach. Could be maybe two and a half days,
24 but --

25 THE COURT: Okay. Now let's get to the

1 exhibit list, Plaintiff's exhibit list. Objections?

2 MS. YERGER: My only objections are to P-3
3 and P-35 for the very same reasons that Mr. Bailey said
4 that I haven't shown him documents. I have never seen
5 those documents before.

6 THE COURT: The affidavit of Paul Weachter,
7 and 35 is the affidavit of Robert Albright. Why would
8 affidavits be used unless it's for impeachment or
9 refreshing?

10 MR. STRETTON: They won't be unless -- these
11 are individuals who heard people make certain
12 admissions. The only reason the affidavits were marked,
13 if those individuals would get on the stand and deny
14 saying those things, we might want to use those for
15 impeachment and/or substantive evidence issues. I
16 assume the individuals will not disagree. For instance,
17 on P-3 --

18 THE COURT: Have you received that yet? *false*

19 MS. YERGER: I received it at the attorneys
20 conference for the very first time.

21 MR. STRETTON: It's in the exhibits. That
22 was the first time, I believe, she saw it. Just to give
23 you an example, P-3 is the affidavit of Paul Weachter.
24 And he talks about Bruce Campbell, who's one of our
25 witnesses, and how Mr. Campbell indicated he saw some of

1 the alleged misconduct by some of the officers against
2 Ms. Suders. If Mr. Campbell, for whatever reason, got
3 on the stand and then denied saying those things, we
4 might want to use Mr. Weachter for impeachment purposes,
5 and the affidavit just sets forth what Mr. Weachter has
6 previously told us.

7 THE COURT: But you'd call Weachter though?

8 MR. STRETTON: Yes. Obviously, I can't put
9 the affidavit in. I wouldn't even try. But I may use
10 it to refresh his recollection or something of that
11 nature. But it would be more for impeachment purposes,
12 maybe substantive evidence under the 803, 804. But that
13 gets dicey sometimes when you're involved in double
14 hearsay in that particular matter.

15 MS. YERGER: That's what I was going to say,
16 it's double hearsay. I'm not sure how he could get it
17 in at all.

18 MR. STRETTON: I can think of some
19 scenarios, but I would agree, I would be really rowing
20 upstream evidentiary on that issue. But I just wanted
21 to have them marked in case it came down to an issue
22 where people were changing their stories, and then I
23 would then try -- obviously, I would go to sidebar. I
24 wouldn't do it in front of a jury. I'd go to sidebar at
25 that particular point and say, here's how I think I can

1 use this. And that's why it's there. But it would not
2 be used directly as substantive evidence. At least, you
3 know, obviously, I'm not going to put the affidavit in
4 and say, here it is. You can't cross-examine on an
5 affidavit.

6 THE COURT: Is that it? Those are the only
7 two?

8 MS. YERGER: Yes.

9 THE COURT: Okay. Let's go to Defendant's.
10 Again, there's quite a long list of witnesses. I assume
11 this is just for --

12 MS. YERGER: It will depend on how the
13 Plaintiff's case presents.

14 THE COURT: Okay. You've agreed that it's
15 going to be five to seven days?

16 MS. YERGER: Yeah. I think that if they're
17 around two, two and a half, that we'll probably be about
18 the same amount of time.

19 THE COURT: Okay. So it's possible it will
20 go into the next week?

21 MS. YERGER: I think so.

22 THE COURT: I just wanted to be sure of
23 that.

24 MR. STRETTON: Your Honor, may I ask some
25 questions? On the witness list, you have a number of

1 state police officers. I was going through those with
2 Mr. Bailey last night, but we weren't quite sure, many
3 of them, who they are and what they would say and how
4 they're involved. Obviously, the people --

5 THE COURT: Do you want to point them out,
6 which ones they are, so you get a proffer?

7 MR. STRETTON: Sure. For instance, Corporal
8 -- number 12, Corporal Heming, or 13, Captain Holmberg.

9 THE COURT: Let's take them one at a time.
10 Corporal Heming.

11 MS. YERGER: Corporal Heming was a corporal
12 at the -- actually, he was a trooper at the
13 McConnellsburg barracks. And depending on how Ms.
14 Suders testifies, he may have rebuttal to her testimony
15 regarding anything that was seen or done.

16 MR. BAILEY: Can you speak up a little,
17 Sarah?

18 MS. YERGER: Sure. He might have rebuttal
19 testimony, depending on how Ms. Suders testifies,
20 regarding anything that he saw or the way he interacted
21 with Suders.

22 MR. STRETTON: Would that be the same then
23 with most of these troopers?

24 MS. YERGER: Pretty much, except for
25 Holmberg. Holmberg is a captain of the troop. He's

1 information, background information for the jury about
2 how the state police is made up, and what his role was
3 as captain regarding PCO's.

4 THE COURT: What are PCO's?

5 MS. YERGER: Sorry. A police communication
6 operator, which is what Ms. Suders was.

7 MR. STRETTON: Then 14, Steven Kagarise.

8 MS. YERGER: Same as Heming. He was a
9 trooper at McConnellsburg.

10 MR. STRETTON: How about number 16?

11 MS. YERGER: She was the troop
12 administrator.

13 MR. STRETTON: At the barracks in question?

14 MS. YERGER: No, at the troop in question.
15 So she was the person -- the first person that Nancy
16 Suders dealt with at the troop.

17 MR. STRETTON: She was not present during
18 any of the alleged harassment?

19 MS. YERGER: No.

20 MR. STRETTON: Of all the officers you're
21 listing, other than the ones who were originally named
22 Defendants, other than Corporal Heming, is there anyone
23 else who would have been present and seen or say, we
24 never saw the others, Baker, Easton, others, do the
25 allegations that Ms. Suders is contending they did?

1 MS. YERGER: Every person on this list,
2 except for the people we've already discussed, and
3 additionally, Jina Wingard and Vicki Marrone, that would
4 be 17 and 28, those two individuals were not at the
5 barracks. But everyone else, except for Holmberg, was
6 at the barracks.

7 MR. BATLEY: The question was, are they
8 going to testify that they never saw Baker do this?

9 MS. YERGER: Do I have to reveal my trial
10 strategy?

11 THE COURT: No, you don't need to, but we
12 need to know just generally what their testimony --

13 MS. YERGER: They're going to testify
14 whether they did or did not see Baker do the wrestling
15 move, yes.

16 MR. BATLEY: Does that include Mr. Easton?

17 MS. YERGER: Yes.

18 MR. STRETTON: That's all right. I didn't
19 mean to tickle your trial strategy. I just wanted to
20 get a sense.

21 THE COURT: Okay. Who else?

22 MR. STRETTON: Well, I think she pretty well
23 covered it. I think that covers the questions I had
24 because they had a number of state officers.

25 THE COURT: Well, go ahead and make sure you

1 get them.

2 MR. STRETTON: Prendergast is down there,
3 and Prendergast is going to say or can you give me the
4 same category as Prendergast?

5 MS. YERGER: He's a prior Defendant.

6 MR. STRETTON: That's right, he is. I'm
7 sorry.

8 THE COURT: That issue doesn't need to come
9 out.

10 MR. STRETTON: No, I don't intend to point
11 out that they were prior Defendants unless, for some
12 reason, there's some issue of bias, but would I go to
13 sidebar before I would reveal that. I don't like
14 mistrials.

15 THE COURT: Okay.

16 MR. STRETTON: Now just out of curiosity, in
17 terms of your affirmative defenses -- and excuse me for
18 talking across the table, Your Honor, and not through
19 you -- I take it, these witnesses will be your
20 affirmative defense also?

21 MS. YERGER: Yes.

22 MR. STRETTON: Is there anyone else that you
23 intend to put on who hasn't been listed?

24 MS. YERGER: I do not have my expert listed
25 because of the nature of the judge's order.

*not otherwise
for a defense*

1 MR. STRETTON: I understand that.

2 MS. YERGER: I will have that soon to you,
3 his name and curriculum vitae. His report will be in a
4 couple weeks.

5 MR. STRETTON: Your affirmative defense is
6 what, just so I understand in terms of how --

7 MS. YERGER: The affirmative defense is just
8 as the judge listed in her order listing it for trial.

9 The affirmative defense is the Ellerth/Faragher test.

10 THE COURT: Assuming they get that far.

11 MS. YERGER: Yeah.

12 MR. STRETTON: Sure. I understand. Thank
13 you. I'm sorry. I didn't mean to put you on the hot
14 seat. I apologize. Forgive me, Your Honor.

15 MS. YERGER: Forgive us. This is actually
16 the first time Sam and I met face-to-face, and it was a
17 little difficult on our telephone conference.

18 MR. STRETTON: Thanks for your courtesy. I
19 always appreciate it. I think she's answered my
20 questions. I didn't mean to grill the opposing counsel.
21 It's not my style. I apologize.

22 THE COURT: It's an unnumbered page, but
23 it's item 3 -- it's three pages from the end, item 3.
24 Plaintiff's counsel has suggested that Plaintiff would
25 be raising Fourth and First Amendment issues at trial.

1 I don't think so. Those issues -- the only issue
2 remaining is what I've listed. It has not been an
3 admitted complaint setting those forth, so there's no
4 First and Fourth Amendment issue in this case.

5 MR. BAILEY: If I may speak to those
6 briefly, Your Honor, the reason that's put in there?

7 THE COURT: Yes, sir.

8 MR. BAILEY: The motion in limine was filed,
9 and due to my errors -- and incidentally, the Court was
10 in error when it thought I was criticizing its order. I
11 was not. I was criticizing my interpretation of your
12 order. But with that being said, we had raised the
13 issue of the First and Fourth Amendments for the
14 following reasons: The motion in limine, you had
15 responded that we were precluded from making any
16 retaliation claim based on the motion in limine. We had
17 come back and asked for an opportunity to respond nunc
18 pro tunc, which was concurred in by opposing counsel,
19 and, of course, you denied that. Now the issue that we
20 had wanted to raise are these First Amendment issues
21 where Nancy Suders had gone and complained about the --
22 to various officials, Virginia Smith Elliott, Mr.
23 Jubelirer, the governor's office, and they apparently
24 resulted in the BPR, which I guess we're not allowed
25 to -- which I suppose you'll ultimately rule that's

1 attorney work product.

2 But in any event, the Fourth Amendment is
3 another issue, Your Honor. We had raised the Fourth
4 Amendment issue, and I was involved in a number of
5 different cases with you where you were doing a Gallo
6 interpretation, Gallo v. Philadelphia. That eventually
7 was overturned, and we had a very cordial conference
8 call with another attorney on that issue, and I think
9 you came around to the Third Circuit's way of analyzing
10 it there. But the point is that, I did not, for fear of
11 offending you at the time with the Fourth Amendment
12 issue, you had made clear that, unless there had been
13 some degree of an issue of seizure, incarceration, that
14 there was a Fourth Amendment claim there. It is true
15 that the Fourth Amendment claim was not raised in the
16 appeal to the Supreme Court. In fact, in the footnote
17 to the Supreme Court opinion, Justice Ginsburg notes
18 that the First and Fourth Amendment claims are not
19 before them. Of course, in the Supreme Court, I was a
20 respondent. Now, all I raise as an issue is, you know,
21 the -- whether you would consider -- we had raised the
22 Fourth Amendment claim based on that theft powder
23 incident which occurred, if you remember. Nancy was
24 forced to go back, take pictures. She was interrogated.
25 I believe she was fingerprinted. Incidentally --

1 THE COURT: Is that on the retrieving her
2 test papers issue?

3 MR. BAILEY: Yes, ma'am.

4 THE COURT: Okay.

5 MR. BAILEY: But it raises two very
6 important points there. Incidentally, the Supreme Court
7 was in error where they noted -- I don't know whose
8 fault this was, or how it came about, or what they got
9 out of the record. I'm not sure. They had indicated
10 she had been handcuffed. I want you to know, she was
11 not handcuffed. She was not handcuffed. But I don't
12 think that goes to the Gallo analysis anyway. But I
13 wanted to ask, I mean, if you would consider, and I'm
14 sure Sarah, you know, that there should be a Fourth
15 Amendment claim there. We only found out -- we only
16 learned at the LR 16.3 conference that the Defendants,
17 the previous Defendants, I'm sorry, had gone to the
18 District Attorney to try to get criminal charges against
19 Nancy because she found her test scores in a drawer.
20 And, you know, that's, you know, we think that's a
21 cogent retaliation and a cogent Fourth Amendment issue.
22 The District Attorney said, no. He said he wasn't going
23 to do it. But we found this letter. We've never had a
24 chance to talk to the District Attorney. It goes back
25 to this BPR stuff, which is claimed to be attorney work

1 product. But it also goes to that Fourth Amendment
2 issue. If the state police were filing Nancy's test
3 results in an unmarked drawer, I don't think anybody
4 disagrees with that, in the lady's bathroom with
5 lingerie, and then go to the -- then to use theft powder
6 and go to the District Attorney to try to get her
7 prosecuted, we think it raises, you know, cogent issues
8 that ought to be brought out.

9 And you may feel that we've waived those
10 issues in effect or they may not be properly before you,
11 but, you know, I think they were raised, and I think
12 they should be considered by the Court. And I think
13 whether or not the government chose to appeal those
14 issues to the Supreme Court or whatnot, given your
15 rulings in Gallo at that time. I had six or seven
16 defendants in cases that did not go forward based on
17 people that I advised not to go forward based on that
18 ruling.

19 I think, in light of that, I would just ask
20 you to consider, out of a sense of loyalty to my
21 client -- it's not that I'm hopeful, I realize that. I
22 have a duty, I think, to ask you to consider a
23 retaliation claim, which you already -- to let us, you
24 know, respond to that motion in limine, which you
25 denied. With that being -- I understand you ruled

1 there, and I'm not trying to be argumentative or to
2 annoy you. But on the Fourth Amendment, if you would
3 consider that.

4 THE COURT: First of all, Mr. Bailey, you
5 don't need to ever worry about annoying me or getting me
6 upset, okay.

7 MR. BAILEY: That's great to hear.

8 THE COURT: I know how you feel. And yet,
9 for the record, how many times do I grant you motions
10 for extension? You know, my concern in any case is that
11 we try to conform to the rules so that the system can
12 operate proficiently.

13 MR. BAILEY: Judge, as I said in my request
14 for you to recuse, you are a great judge, and I'll say
15 that on any public record --

16 THE COURT: But you feel --

17 MR. BAILEY: -- but you don't like me.

18 THE COURT: Now that, sir -- Mr. Bailey, I
19 am not the type of person that goes around disliking
20 people. If that were the case, I wouldn't be here. A
21 person like that can't sit in this position. I
22 sometimes get upset when you don't follow the rules, I
23 have to admit that. But I do that with every attorney
24 who doesn't follow the rules.

25 MR. BAILEY: Well, we have respectful

1 differences of opinion. Thank you.

2 THE COURT: May I have your response, Ms.
3 Yerger?

4 MS. YERGER: Sure, Your Honor. I have the
5 complaint before me, and I see nowhere in this complaint
6 where there's a Fourth Amendment claim whatsoever.
7 There's a partial First Amendment claim, which we then
8 -- so the Fourth Amendment claim, I never addressed in
9 summary judgment because I didn't see a claim. He
10 didn't amend the complaint. As far as I'm concerned,
11 there is no Fourth Amendment complaint in this case, and
12 I don't know how he could even suggest one given his
13 complaint and the fact that there is no amended
14 complaint.

15 MR. BAILEY: In the addendum clause, I had
16 indicated, and such other relief as the Court deems
17 appropriate, based on research I had done and based on
18 what I had believed were affirmative duties by federal
19 district judges to look at claims or help to find
20 claims. What I was expressing earlier was that, at the
21 time -- this is during a period of time we're working on
22 the Clevenger cases, and, you know, quite frankly, I
23 walk in daily fear of being sanctioned. And I also
24 wondered if, you know, if I put that claim in there
25 without an incarceration or handcuffing, if I'm not

1 going to get sanctioned for it. Lavery and whatnot,
2 those guys, always take that approach. And that's the
3 reason why. I'm just saying that the claim is there.
4 It was there. The facts are very clear. No one even
5 disagrees on the facts. There is a Fourth Amendment
6 claim. And I feel duty bound to my client to raise the
7 issue and respectfully ask if you might consider it.
8 That's all.

9 THE COURT: What about the First Amendment?

10 MS. YERGER: The First Amendment claim,
11 although that issue came up via the retaliation, you
12 ruled against that in summary judgment and found in the
13 Defendants' favor. And that issue was never appealed.
14 Therefore, he waived any opportunity to raise the First
15 Amendment claim. I did the motion in limine out of
16 concern that the First Amendment retaliation would come
17 up again. Again, First Amendment shouldn't be an issue
18 either because he waived it. He waived both of them.

19 THE COURT: Now there are apparently some
20 objections to the Defendant's exhibits. I haven't had a
21 chance to look at the motion.

22 MR. BAILEY: These, Judge, I can summarize
23 these if you want.

24 THE COURT: Well, 20, 21, and 22 are
25 interview notes of Nancy Suders.

1 MS. YERGER: Those interview notes, I was
2 only going to use if -- mostly for the purposes of
3 impeachment.

4 THE COURT: Impeachment of Ms. Suders
5 herself, right?

6 MS. YERGER: Yes.

7 THE COURT: Is that a problem?

8 MR. BAILEY: I don't know when the notes --
9 where did they come from? You pick things that you call
10 attorney work product from the BPR --

11 THE COURT: Are these Ms. Suders' notes
12 themselves?

13 MS. YERGER: No, they're the interview notes
14 from the, I believe, view panel members. There were
15 three panel members that interviewed her. The relevance
16 is limited. It's only depending on what she says during
17 her --

18 THE COURT: You're going to use somebody
19 else's notes to impeach her or were they interviews of
20 Ms. Suders herself?

21 MS. YERGER: They were interviews of Ms.
22 Suders herself.

23 MR. STRETTON: But not adopted by Ms. Suders
24 and not seen by her until recently.

25 MR. BAILEY: There's a second -- that's

1 exactly right. All of these things here violate Rule
2 26. They were never disclosed. We had no idea they
3 ever had them. They showed up at the 16.3. A lot of
4 them are phone interviews, which incidentally violate
5 the state police's own IAD requirements. And we just
6 felt that we never had a chance to look at them,
7 cross-examine them, or anything else. Apparently, these
8 were the -- if I may be mistaken, Sarah can help me --
9 these were notes, I think, that were put together during
10 the pre-hiring process, pre-hiring process. We were
11 never made aware of this, didn't know they had them, or
12 anything.

13 MS. YERGER: Just to respond to him. He is
14 correct, I did not do a written disclosure about the BPR
15 and the documents attached to the BPR. [And the BPR
16 again is the attorney work product investigation that
17 was done. [I didn't do it because I didn't believe that
18 I needed to disclose attorney work product information.
19 And at the same time, Mr. Bailey never made any kind of
20 production request or interrogatory request to me about
21 any -- about the BPR, which he did know existed.

22 MR. BAILEY: Well, that, I respectfully
23 disagree with. We were told by counsel initially that
24 there was no BPR. Then we were told that, if there was
25 a BPR, we didn't get it because it's attorney work

1 product. But I would also like to be on the record to
2 objecting because the BPR is not attorney work product.
3 And I think Judge Dalzell, in a case, Weller v. Evanko,
4 in the Eastern District -- and I really want to be
5 careful. I don't want to misrepresent the case to you,
6 Judge. But I believe he spoke directly to that issue.
7 To my knowledge, the Pennsylvania State Police never
8 appealed his decision. I realize it's not a Middle
9 District decision, however.

10 MS. YERGER: We do, however, have a Middle
11 District decision deciding this by Judge Jones, and I
12 refer to it in my pretrial memo, in which he says,
13 attorney work product is not -- attorney work product
14 investigations do not have to be turned over, produced.

15 MR. BAILEY: We don't disagree that attorney
16 work products don't have to be turned over. That's not
17 the issue. The state police go in, they take an officer
18 from the Pennsylvania State Police, use them to go out
19 and do Garrity warnings on people. I just got a case
20 recently on admissions where a client of mine was
21 brought in, given Garrity warnings, and they questioned
22 him on the admissions that are in a district court case.
23 And as long as our judges keep letting this go on,
24 Plaintiffs are going to have a problem. And we would
25 respectfully object that you can't use that state power

1 and badge of authority to do the attorney work product
2 when they have that employer control and badge of
3 authority over a Plaintiff or over a witness and what
4 they did in this case. And I don't think Judge Jones is
5 saying that. What he is saying is, if you have a bona
6 fide attorney work product, who can disagree that that
7 should not be discoverable? I don't. That's not the
8 issue. That's not the way this is done. They take this
9 thing and they do -- they do a -- they BPR. They send
10 officers out. They're in uniform. If they're not in
11 uniform, they display a badge of authority. They
12 investigate and talk to people. They use all that state
13 power, they gather this information, they go back to the
14 state attorney in the civil case, in this case, the AG's
15 office operating under the Commonwealth Attorney's Act,
16 and they say, that's attorney work product.

17 Now my understanding is, and again, I don't
18 want to mislead this Court, because it's an important
19 issue, and I realize that. I believe -- the only case I
20 know of that has ever spoken to the issue, Judge -- I
21 don't know of Judge Jones' decision. I have to look
22 that up if it speaks to the IAD or BPR issue -- was
23 Judge Dalzell's rather extensive opinion, which I'm
24 almost certain was not appealed. And that was a case of
25 Weller v. Evanko.

1 MS. YERGER: If I may reply, Your Honor?
2 This whole discussion should have been done with you
3 during discovery. He knew that a BPR existed. And I
4 can point to deposition testimony where I said that the
5 BPR existed and I wasn't going to turn it over because
6 it's attorney work product. At that point, he had an
7 obligation to file production requests, and he had an
8 obligation to set up a telephone conference with you or
9 do a motion to compel. He did none of those things.
10 And now he's making an argument that he should have made
11 during that discovery period.

12 MR. BAILEY: We argue as a Rule 26
13 obligation.

14 THE COURT: All right. Twenty-four, the
15 telephone reference check, what is that?

16 MS. YERGER: Again, it was a pre-employment
17 background information check done for the purposes of
18 finding out Ms. Suders' listed references, and then
19 those references were called. The reason --

20 THE COURT: What's the relevance of that?

21 MS. YERGER: Because many of the people that
22 she has listed as references, she also has listed --
23 many of the people that are in these documents, she also
24 has those people listed as witnesses. And I wanted to
25 be able to question them about that, if it's different.

1 The reference check list basically doesn't give very
2 good references for Ms. Suders. If those people come
3 into trial and say something different, I wanted to be
4 able to use it for the purpose of --

5 THE COURT: Impeachment?

6 MS. YERGER: -- impeachment.

7 MR. BAILEY: Your Honor, we weren't -- I'm
8 sorry. We weren't using those witnesses -- I mean,
9 they're being used in a different way. The issue that
10 we had a concern about with some of those witnesses were
11 things that they had done either in the IAD
12 investigation or what they had witnessed at the station;
13 quite frankly, for that purpose, their personal opinion
14 of Nancy Suders. We have a relevancy problem with it,
15 too, because the issue is the conduct, just as we do
16 with the issue of how competent or incompetent her
17 employment may have been. I mean, we can produce people
18 to say that, too. Our objection was on those grounds.
19 We hadn't seen them before. If I understand this, these
20 things, they were phone interviews where the officer, an
21 officer would call up and question these people about
22 her. So, I mean, it's hearsay -- if the person is a
23 witness, I understand that issue, but these telephone
24 reference check forms --

25 THE COURT: I think she said she was going

1 to use them only if a person testified.

2 MR. BAILEY: Oh, okay. I didn't know that.

3 THE COURT: But I'm still concerned about
4 the relevance. So somebody interviewed her and maybe
5 there was a bad interview or what?

6 MS. YERGER: Well, here's an example. On
7 their witness list, they have listed Sheriff Pittman.

8 THE COURT: Okay.

9 MS. YERGER: Sheriff Pittman is one of the
10 people that was called for a reference. And Sheriff
11 Pittman -- if Sheriff Pittman gets up and says that she
12 was a great employee for him, because she worked for him
13 before going to the state police, and that she would
14 have made a great PCO, then I would have a problem with
15 that, because he told, in this report, he told -- he
16 said something different to PSP officials.

17 MR. STRETTON: Sheriff Pittman, as I
18 understand it, wouldn't be called -- certainly, we're
19 not going to call people as character witnesses,
20 obviously, on Nancy Suders. But it's my understanding,
21 Sheriff Pittman actually observed some of the alleged
22 misconduct.

23 THE COURT: That's what you're going to use
24 him for?

25 MR. STRETTON: That would be the only

1 purpose. I'm not going to put people on and say, I
2 highly recommend her, she was the best thing since
3 sliced bread or something of that nature. There's
4 probably no issue here, because if I call any of those
5 -- some of these other witnesses like Pittman, I will be
6 very specific about if he saw something that's relevant
7 to the sexual harassment, period. And it's not going to
8 be that she was a wonderful employee for me for 10 years
9 or for anything of that nature.

10 THE COURT: Twenty-five, background
11 verification report.

12 MS. YERGER: It's the same as the telephone
13 verification. It just compiles information that was
14 received on the telephone report.

15 THE COURT: Before you use any of these, if
16 I don't preclude them ahead of time, I want a sidebar
17 before you produce them.

18 MS. YERGER: Okay.

19 THE COURT: Thirty-one.

20 MR. BAILEY: You mean 31, Judge? Did you
21 say 31?

22 THE COURT: Thirty-one.

23 MS. YERGER: Thirty-one is a letter to the
24 sergeant of the station from the district attorney
25 stating that charges were -- are not going to be filed

1 against Ms. Suders for any kind of theft. Again, the
2 district attorney is on their witness list, and it would
3 be dependent on what he said, if it was anything
4 different than that letter that he sent to Sergeant
5 Easton.

6 THE COURT: I think everybody apparently
7 agrees that he refused to bring -- to pursue any
8 charges.

9 MS. YERGER: Except that letter suggests
10 that he thinks charges could have been brought.

11 MR. STRETTON: Well, at this point,
12 obviously, if I call the district attorney, and he
13 says -- and I elicit X, then I think it's fair game for
14 her to bring 31 in, but I don't think I'm going to be
15 that stupid to do that. But at this point, I don't
16 think you have to make a ruling on it. If I'm going to
17 do something or if she's going to do something, we'll
18 see you at sidebar at the appropriate time, but I don't
19 intend to open any door on that issue.

20 THE COURT: All right. I'll make my ruling
21 then. 33 and 34. 33 are photographs as well as 34.
22 Photographs from Degeneration X? That almost sounds
23 like a movie. What is Degeneration X?

24 MS. YERGER: Those are photographs that Mr.
25 Bailey provided to me on my production request.

1 THE COURT: What's Degeneration X?

2 MS. YERGER: I think it's a wrestling --
3 it's something to do with wrestling.

4 MR. BAILEY: Your Honor, Nancy had testified
5 -- and again --

6 THE COURT: I know where you're coming from.
7 I got it. Okay.

8 MR. BAILEY: Judge, in fairness to Sarah,
9 because I think I may have misled you, and I didn't mean
10 to. I don't believe they are the actual photographs
11 that were appended to the wall. I think I --

12 THE COURT: Is that --

13 MR. BAILEY: I think I misled them. I am
14 sorry.

15 THE COURT: Well, what is your objection to
16 33 and 34?

17 MR. BAILEY: Yes, ma'am. These were
18 photographs that were offered to us for the first time
19 that Sarah provided to us. Am I mistaken, Sarah? You
20 provided photographs or maybe I made --

21 MS. YERGER: Photographs of the barracks,
22 the bathroom. I just took the photographs because I
23 wanted to use them for trial.

24 THE COURT: So these are photographs of the
25 barracks?

1 MS. YERGER: Yes.

2 THE COURT: Not photographs that allegedly
3 were pinned up somewhere?

4 MS. YERGER: No.

5 MR. BAILEY: Well, the trouble with that is,
6 we don't know when they were taken. We never had any
7 opportunity to participate in either the taking of them
8 or when they were taken for what purpose and we should
9 have been notified and should have been told about that.

10 THE COURT: What's the purpose of it?

11 MS. YERGER: The purpose of the photographs
12 of the women's locker room, this whole issue of her
13 going into the locker room and whose locker -- whose
14 locker was responsible for what, that issue will be at
15 the trial because she's claiming she went into an
16 unmarked drawer to get stuff out, and that's not what --
17 we're saying that the drawer was marked and she took out
18 stuff that wasn't hers. And that's the whole reason why
19 the theft detection powder was sprinkled in the first
20 place. These photographs just give a snapshot. And
21 then I would have my witnesses basically show that the
22 photographs are accurate representations of what that
23 bathroom looked like, so the jury can get a picture in
24 their mind of what we're referring to.

25 THE COURT: Who took the pictures?

1 MS. YERGER: Someone at the McConnellsburg
2 barracks.

3 MR. STRETTON: When were they taken though,
4 because the incident happened in '98, I believe? Were
5 they taken in '98 or were they taken --

6 MS. YERGER: No, they were just taken, and
7 my witness would basically say that that bathroom -- the
8 bathroom has not changed since 1998.

9 THE COURT: Have they seen the photographs?

10 MS. YERGER: Yes. The witnesses? Yes.

11 THE COURT: No, have you folks seen them?

12 MS. YERGER: Yes, I turned them over.

13 MR. BAILEY: They were produced at the 16.3.
14 I would like to, in fairness to Sarah, I think she had
15 indicated to you that -- I don't think they will offer
16 testimony that the drawers were marked.

17 MS. YERGER: Yes, I will.

18 MR. BAILEY: Well, it's my understanding the
19 testimony was that they had allegedly been designated
20 for people. But be that as it may, these photographs,
21 you know, we could have been consulted. We could have
22 had an opportunity to go out and participate in that or
23 take different pictures in different ways maybe, but,
24 you know, they're so far years later. And then to come
25 in to use the photograph of somebody that's going to

1 say, well, it's the same, we object to that. I mean,
2 that's something they could have done also during the
3 period of time that we were in discovery or working on
4 that issue at a more contemporary time. And there's
5 another thing. It's just a little -- there were
6 designated drawers in filing cabinets that weren't in
7 this bathroom which also had a bed in it. But the --
8 and those photographs, and I don't know how those
9 photographs were that clear to that. Is there a bed in
10 those photographs?

11 MS. YERGER: Yes.

12 MR. BAILEY: There is. I don't remember
13 seeing it. In fairness to her, I don't remember seeing
14 that. But anyway, there were other drawers that were in
15 filing cabinets that were -- that people had their
16 filing cabinet drawers, which is where Nancy's papers
17 were supposed to be.

18 THE COURT: Not in the bathroom though?

19 MR. BAILEY: Yes, ma'am, in the bathroom.

20 THE COURT: The file cabinets were in the
21 bathroom?

22 MR. BAILEY: No, ma'am, they were not in the
23 bathroom. And people did have marked and designated
24 drawers for their own personal stuff in portions of
25 these filing cabinet drawers. You know, I don't know

1 how relevant those issues are anyway to the allegations
2 of the sexual misconduct. They may be, I understand,
3 probative of a constructive discharge issue. I would
4 assume that's why Sarah is bringing it up.

5 THE COURT: Why do you want the pictures?

6 MS. YERGER: I think the pictures will help
7 the jury understand what the bathroom looked like. Ms.
8 Suders is probably going to testify that she went into
9 the bathroom, the whole incident with her hands becoming
10 blue in the bathroom and the blue all over the bathroom,
11 not to mention the fact that there's a suggestion that
12 there's something sexual about a bed being in the
13 bathroom, there's a suggestion that there's something
14 sexual about things that were in the drawers, and I
15 think the jury is entitled to see what that bathroom
16 looked like and the fact that they were dresser drawers
17 that were used for also filing. And my witness will
18 testify to that, that they put certain personal items in
19 there, but they also stored some work papers in there,
20 that they didn't have any other location throughout the
21 barracks to do that. And it's just an opportunity for
22 the jury to see this room that we're going to be talking
23 about over and over in the trial.

24 THE COURT: What's the time span between the
25 time of this incident and the time of the pictures?

1 MR. STRETTON: Seven years.

2 MS. YERGER: It is seven years. And that
3 would have to go to, you know, me laying a foundation
4 with my witnesses about whether that bathroom looks the
5 same or not. There's also, I might add, there's also
6 pictures of the communications area where Ms. Suders
7 worked, the communications desk, the computer, and the
8 surrounding area, because some of the allegations have
9 to do with where the sexual harassment took place, the
10 incidents of alleged harassment took place. And again,
11 those pictures are for the same purpose, for the jury to
12 have a picture in their mind of where she sat and what
13 it looked like from her perspective.

14 THE COURT: You mean to tell me, in seven
15 years, nothing about that has changed?

16 MS. YERGER: About those two rooms. Those
17 are the only two rooms I offered pictures of. There has
18 been a change to the barracks. They added another part.
19 I didn't take pictures of that section. I just took
20 pictures of the two rooms that have not changed. And in
21 laying the foundation, I will have my witnesses testify
22 about, if anything has changed. And one witness will
23 say that there is a computer -- there's not a computer
24 where there used to be one. They used to have two
25 computers. And that's the only change to that desk

1 area.

2 MR. BAILEY: That's not the bathroom, that's
3 out in the --

4 MS. YERGER: Right, that's the
5 communications area.

6 THE COURT: Any other objections?

7 MR. STRETTON: No, Your Honor.

8 MS. YERGER: Your Honor, I forgot to object
9 to one of their exhibits, and I apologize. I hadn't
10 marked it. They have magazines, wrestling magazines
11 listed. I'm trying to find where it is. Exhibit 27,
12 wrestling magazines. They've never turned those over.
13 They showed them to me briefly at the attorneys
14 conference, but I haven't really had the opportunity --
15 they never gave me even black and white copies when they
16 did give me the rest of the documents, so I haven't
17 really had an opportunity, and plus I'm not sure of the
18 relevance.

19 MR. BAILEY: The reason for the pictures is
20 that, and the pictures and the magazines, was that Mr.
21 Baker copied this move from these magazines and these
22 pictures. And I think we can demonstrate that. To the
23 extent that showing somebody how he would do this, this
24 thing, and then make this, it came off of TV and it was
25 sort of a cult, and he was a super big fan, which I

1 think he admits, of the TV wrestling kind of thing. And
2 that's the reason for the photographs, to show the jury
3 physically -- I mean, I don't see how he can, you know,
4 have Nancy get out there and demonstrate the move or
5 have him get out to demonstrate what it is and how it
6 looks, but those pictures show that. That was our
7 reason for that. I realize -- I mean, I understand --

8 MS. YERGER: I'm going to withdraw the
9 objection. I just want a copy of that.

10 THE COURT: Okay.

11 MR. STRETTON: Sure. May I just ask, you
12 don't have a copy of our exhibits?

13 MS. YERGER: Of that particular exhibit. It
14 was just magazines.

15 MR. STRETTON: Do you want me to get you a
16 complete copy of every exhibit?

17 MS. YERGER: No, just that one.

18 THE COURT: My concern is, making another
19 copy on that copy is not going to be good production.

20 MR. BAILEY: I understand. Yes, ma'am.

21 THE COURT: See if you can get the magazine.
22 Do you have the magazine?

23 MR. BAILEY: We have the magazines and the
24 pictures, and they're color, and I can -- yeah, let me
25 get those.

1 MS. YERGER: But I guess only the pictures
2 that are listed are the pictures that -- they're not
3 going to have somebody flipping through a magazine?
4 That was my question.

5 MR. STRETTON: No.

6 THE COURT: Whatever he has there is what
7 you'll get. Plaintiff's voir dire. On number 9, I
8 think it needs to be rephrased.

9 MR. STRETTON: I agree, looking at it.

10 THE COURT: I think what you need to do is,
11 if you find from the evidence that she is entitled to
12 recover, is there anyone who could not fairly and
13 adequately render a decision or grant damages or
14 something to that effect? So rephrase that.

15 MR. STRETTON: I'll have that rephrased for
16 the Court.

17 THE COURT: Okay. Number 10, my only
18 concern about that is that, unless they know what
19 punitive damages are, they might have difficulty
20 answering the question.

21 MS. YERGER: Actually, my problem with that
22 is, it's a Title 7 case, and there is no punitive in
23 Title 7 cases.

24 MR. STRETTON: So that's the end of that
25 one.

1 THE COURT: Numbers 11 and 12, I will, when
2 I introduce the parties, will introduce the attorneys
3 and follow through with the question about prior contact
4 with either the firm or the Attorney General's Office.
5 So I'll cover that.

6 MR. STRETTON: Your Honor does the voir dire
7 questioning. We don't do any, is that right?

8 THE COURT: What?

9 MR. STRETTON: You do all the voir dire.

10 THE COURT: No, only in criminal cases I do
11 all the voir dire. The only reason I request these
12 ahead of time is so you don't get up there and ask a
13 question that might present a problem. But you will do
14 the voir dire. I will introduce the case, introduce the
15 parties, introduce the attorneys, and ask whether
16 there's any relationship and so forth, and then I'll
17 turn it over. You'll be the first one.

18 MS. YERGER: You'll remain in the courtroom?

19 THE COURT: Absolutely.

20 MR. STRETTON: I guess I forgot. The last
21 case I tried was that old criminal case in front of you.
22 I had forgotten.

23 THE COURT: Yeah. I didn't have anything
24 further. In Defendant's voir dire, number 7 needs to be
25 rephrased.

1 MS. YERGER: What do you have a problem
2 with?

3 THE COURT: Let me see.

4 MR. STRETTON: I object to numbers 7 and 8
5 in my notes here.

6 THE COURT: They could be rephrased. I
7 think it said that, does the mere fact that a person has
8 filed a lawsuit -- do you believe, by the mere fact that
9 a lawsuit has been filed, means that the person is
10 entitled to relief? I have a problem with that.

11 MS. YERGER: Okay.

12 THE COURT: Number 18.

13 MR. STRETTON: We were objecting to it.

14 THE COURT: Yeah. That's too broad for them
15 to answer. I'm declining that. Number 20.

16 MR. STRETTON: I would object to that. I
17 think it's getting too deep.

18 THE COURT: I know, I know.

19 MS. YERGER: Okay. I'm fine.

20 MR. STRETTON: So 20 is out and 18 is out?

21 THE COURT: Yes.

22 MR. STRETTON: Thank you. And 21 --

23 THE COURT: Hold on. I have that one, too,
24 but let me read it. Yeah, I'm refusing 21. Number 22
25 will be answered by the jurors themselves. There is a

1 questionnaire before you begin your voir dire -- by the
2 way, I should indicate this, there's a questionnaire.
3 It's about six questions on it, the last question being,
4 have you ever served on a jury before? And depending on
5 the answer, I will follow through. The basic
6 questionnaire asks number of people in the household,
7 spouse's employment, if retired, how they were employed
8 before retirement, extent of their education, and then
9 service on a jury. And I will follow through on
10 responses to those questions, and then I'll turn it over
11 to voir dire. So, in essence, 22 is covered. I'm
12 declining 24. They will get instructions in the case of
13 the procedure that is followed and that they have to
14 keep an open mind until they've heard all of the
15 evidence. On 25, I will try to remember to advise them
16 that this trial is likely to start the afternoon of
17 March 14, and possibly go into the following week. And
18 the only -- the only question I will ask them is whether
19 they have any prepaid vacation, any medical appointments
20 which cannot be altered. That would be the only thing
21 that I would permit them to be excused for, because by
22 that time, they should already have had their excuses
23 presented to me for employment purposes or otherwise.
24 Number 26 is, no. It may be a follow question if
25 somebody maybe gives a response that may perhaps

1 indicate a personal attitude, I will follow through with
2 it.

3 MS. YERGER: Okay.

4 THE COURT: The issue here is whether you
5 can hear the evidence putting aside any personal
6 feelings and render a fair and impartial verdict. But
7 this question is going to depend on an answer, number
8 26. Twenty-seven again involves the charge. It's a
9 difficult question to ask in the void. First of all, an
10 individual won't know whether they disagree with the
11 charge.

12 MS. YERGER: Until he hears the charge.

13 THE COURT: Secondly, they're told, whether
14 they disagree with it or not, they have to follow it.
15 But I see some relevance, you know, even if you're told
16 that you cannot -- that you must apply the law even
17 though you personally disagreed with it. You can ask
18 it. The question is, it's in a void. I don't know how
19 they can say, well, gee, I don't know what I would
20 disagree with, so I don't know whether or not I would
21 follow the instruction.

22 MS. YERGER: That was a question that I
23 asked at another trial, in another sex trial, and it was
24 asked sort of at the end as a follow-up to other
25 questions that had been asked. And an individual

1 basically said that he would have a problem because he
2 doesn't like the sexual harassment laws. And they will
3 know at that point what those laws are. And it became
4 clear that, that should be someone who should be
5 striked.

6 THE COURT: You can give it a go. See what
7 happens.

8 MS. YERGER: Thank you.

9 THE COURT: All right. Mr. Stretton, do you
10 have any other objections?

11 MR. STRETTON: No, Your Honor. We're
12 picking an 8 person or a 12 person jury?

13 THE COURT: Eight, with the understanding,
14 we can lose two and go with six. We have a built-in two
15 alternates, but they will be full jurors if they're
16 still there at the end of the case.

17 MR. STRETTON: It's a unanimous verdict
18 or --

19 THE COURT: Unanimous with that short number
20 of people.

21 MR. STRETTON: If I recall, it's three
22 strikes?

23 THE COURT: Correct.

24 MR. STRETTON: I always get confused with
25 the state system.

1 MS. YERGER: After we pick the jury, will we
2 do our openings that afternoon?

3 THE COURT: We're going to try. A lot is
4 going to depend -- now, I will have to give a
5 preliminary instruction before you give your opening.
6 Anything else?

7 MS. YERGER: I don't know if you usually
8 will do an order after this, but I was just wondering
9 about when special verdict questions and jury
10 instructions --

11 THE COURT: Actually, the sooner the better.
12 I know sometimes it's difficult to do that, but it gives
13 us a chance to get a charge, draft it, and present it to
14 you, so that you can review it. And it makes our charge
15 conference go a lot faster if you know what's being
16 done. So as soon as you can get those to us, it would
17 be helpful. I know my case management order, I think,
18 indicates at the pretrial conference, but the local
19 rules say, after the Plaintiff presents its case, but
20 that's too short for us. Some cases can go too rapidly.
21 Anything else?

22 MR. BAILEY: Your Honor, I have one other
23 thing. Because of my concerns about this issue
24 pertaining to the OIG report, Kroll report, Mr. Stretton
25 is very kind in putting up with me in these situations,

1 but I will probably beseech him to put into the opening
2 a reference to -- and I don't want to spring this as a
3 surprise, if he decides to agree with me -- but a
4 reference to this state police policy and their
5 noncompliance with it and the admissions against
6 interest which the state government has exhibited. I
7 will -- again, because I don't want to sound like I'm,
8 you know, being annoying and whatnot, if we have --

9 THE COURT: Wait a minute, wait a minute,
10 wait a minute. You used the term IG report.

11 MR. BAILEY: Yes.

12 THE COURT: I need to know which report is
13 which. We have the BPR report. We have a Kroll report.
14 We have an IG report. Are they all three different
15 reports?

16 MS. YERGER: Yes.

17 MR. BATLEY: Ma'am, yes. The IG report, we
18 discovered, I believe, after -- no, the IG report was a
19 report that we discovered just before the Supreme Court
20 argument which I lodged with the Supreme Court. I
21 believe it's fair to say that, in my mind, when I looked
22 at these two reports, the Kroll report was then
23 commissioned by the governor, came along, worked off of
24 that IG report, I believe, did some of their own things.
25 And I may be mistaken about this. All I want to raise

1 is this: I'd like -- and understanding, I mean, I'll
2 talk to Mr. Stretton about that. If he agrees that
3 issue can be raised, you know, I'll endeavor. I know
4 I'm going to respond to the pretrial order to note out
5 the sections that we were referring to and inform her
6 and inform you whatnot of the portions in that report
7 and whatnot. But I'm saying, are we precluded -- if
8 we're going to use something like that in the opening or
9 want to, I don't want to run afoul of you or, you
10 know -- I want to try to convince Mr. Stretton to do
11 that. He's shaking his head here.

12 MS. YERGER: I would ask the Court to make a
13 ruling. .

14 MR. BAILEY: We'll bring it to your
15 attention first. That's what I'm saying.

16 MR. STRETTON: I guess it's my understanding
17 that, in my opening, I'm not to mention it. I'm going
18 to submit to you sometime today and to her --

19 THE COURT: Both.

20 MR. STRETTON: -- the areas that I would
21 like to use in terms of rebuttal, but I would not
22 reference those in my opening unless and until -- well,
23 if at all --

24 MS. YERGER: I'm going to object, you can
25 believe that, no matter what you do.

1 MR. STRETTON: I would not reference it in
2 my opening, and then if and when it becomes relevant on
3 rebuttal, and assuming you have indicated that you'll
4 consider it, depending on the evidence as it develops,
5 we'll go to sidebar, and then you will call the balls
6 and strikes and resolve it. And the jury won't know
7 unless you say we can present it. But it would seem to
8 me, based on your ruling this morning, that it would be
9 premature to go in the opening. If, for some reason I
10 can come up with a brain storm, I think it would be
11 relevant in my opening, I would file a brief motion in
12 advance and ask you to consider that. But I wouldn't
13 say it without you giving me permission to. I don't
14 like mistrials in Plaintiff's cases.

15 THE COURT: Anything else? Yes, Mr. Bailey.

16 MR. BAILEY: Lastly, I would like permission
17 to acquire copies of those reports. I believe they
18 should be brought to the Court's attention, and I'm sure
19 you would have an interest in them because they affect
20 what we have already been told is going to be presented
21 to a jury, an affirmative defense where this is
22 particularly probative, and I know you would never want
23 your courtroom to be used to present information to a
24 jury that does not comply with state law. So I just ask
25 for permission on the record here to provide the Court

1 with copies of those reports just because of the value
2 that's in them.

3 MS. YERGER: My response is that, they are
4 attorney work product, and he's not entitled to the
5 investigation report.

6 MR. BAILEY: Well, you had asked originally,
7 Judge, in fairness to you, I realize, and I apologize
8 about the different reports. There's the IG report. I
9 don't think she's objecting to that, if I heard her
10 correctly.

11 MS. YERGER: That isn't on your exhibit
12 list.

13 MR. BAILEY: No, I want to give it to the
14 Court. I think the judge should be able to be informed
15 on the law and the facts if she's going to make rulings.
16 And this is not to give to the jury. I'd like to
17 provide it to the Court. You don't object to that, I
18 don't think?

19 MS. YERGER: I'm not going to object if you
20 want to review them.

21 MR. BAILEY: And the Kroll report. The
22 issue to the BPR, Your Honor, is separate, and that was
23 the issue of whether or not it's an attorney work
24 product, and I don't think you did rule on that. That's
25 what we objected to because we never had a chance to see

1 that.

2 THE COURT: Anything else?

3 MR. STRETTON: Just one -- I just want to
4 make sure. You're withdrawing your letter then asking
5 the judge to recuse herself?

6 MR. BAILEY: I didn't withdraw the letter.

7 MR. STRETTON: I thought you did.

8 THE COURT: There's no motion. It's a
9 letter.

10 MR. BAILEY: It's a letter, and I did it out
11 of courtesy to Judge Rambo. I made that very clear in
12 the letter.. She can consider it, for what it is worth.
13 And I discussed that with Sarah. And I discussed it
14 with you. And, you know, I don't know whether, if you
15 would want me to do a formal motion, I'll certainly do
16 one. I'm going to consider that, obviously, because
17 you're not responding to that.

18 THE COURT: You have to do what you think
19 you need to do.

20 MR. BAILEY: Yes, ma'am.

21 MR. STRETTON: Why don't we resolve this
22 issue right now. Based on the judge's rulings, why
23 don't we just leave that aside and just try this case?

24 MR. BAILEY: I will make my decision based
25 upon what I think best, Your Honor, for my client. I

1 highly respect Mr. Stretton. I certainly take his
2 advice. But this has got to be -- I've got to talk with
3 Nancy about it. I talked with Nancy before I submitted
4 the letter.

5 MR. STRETTON: I think we covered everything
6 I can think of. And thank you, Your Honor. Have a good
7 day.

8 (Whereupon, the proceeding adjourned at
9 10:20 a.m.)

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